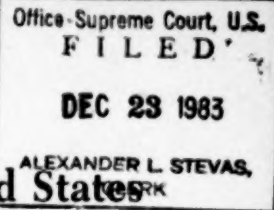

No. 83-736



IN THE
Supreme Court of the United States

October Term, 1983

LEO J. CLIFFORD, JOSEPH CLIFFORD, CLARENCE FLITTER,
CLARENCE AILES, EDWARD GANNON, Individually And
As Members of The Board of Lay Trustees of St. Paul's
Cemetery Association, Valparaiso, Indiana; ST. PAUL'S
CEMETERY ASSOCIATION, VALPARAISO, INDIANA; AND ST.
PAUL'S CEMETERY ENDOWMENT ASSOCIATION, INC., An
Indiana Not-For-Profit Corporation,

Petitioners

v.

ANDREW G. GRUTKA, AS BISHOP OF THE ROMAN
CATHOLIC DIOCESE OF GARY, INDIANA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE INDIANA COURT OF APPEALS, THIRD DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM BENTLEY BALL*
PHILIP J. MURREN
SANDRA E. WISE
BALL & SKELLY
511 North Second Street
P.O. Box 1108
Harrisburg, PA 17108
(717) 232-8731

WILLIAM J. O'CONNOR
5272 Hohman Avenue
Hammond, IN 46320
(219) 937-0500

*Attorneys for Respondent Andrew G.
Grutka As Bishop of the Roman
Catholic Diocese of Gary, Indiana*

**Counsel of Record*

QUESTIONS PRESENTED

1. Did the Indiana Court of Appeals correctly apply principles of law required by decisions of the Supreme Court of the United States in determining that a bishop of a diocese of the Roman Catholic Church had authority of control and disposition of the properties of a cemetery titled in him and held in trust by him for the diocese?

2. Is the jurisdiction of this Court barred by 28 U.S.C. Section 1257 in a case which is presently remanded by a state intermediate appellate court to the trial court for determination of a fact which may be dispositive of the litigation?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Counterstatement of the Case	2
Summary of Argument	4
Reasons Why the Writ Should Be Denied	4
Conclusion	6

TABLE OF AUTHORITIES

<i>Cases:</i>	Page
<i>Jones v. Wolf</i> , 443 U.S. 595 (1978)	3, 4, 5
<i>Maryland & Virginia Eldership of the Churches of God v.</i> <i>Church of God at Sharpsburg</i> , 396 U.S. 367 (1970)	4, 5
<i>Presbyterian Church v. Mary Elizabeth Blue Hull Presby-</i> <i>terian Church</i> , 393 U.S. 440 (1969)	4, 5
 <i>Statutes:</i>	
28 U.S.C. §1257	i, 4, 5, 6
 <i>Constitutions:</i>	
U.S. Constitution:	
Amendment I	3
Amendment XIV	3

No. 83-736

IN THE
Supreme Court of the United States

October Term, 1983

LEO J. CLIFFORD, JOSEPH CLIFFORD, CLARENCE FLITTER,
CLARENCE AILES, EDWARD GANNON, Individually And
As Members of The Board of Lay Trustees of St. Paul's
Cemetery Association, Valparaiso, Indiana; ST. PAUL'S
CEMETERY ASSOCIATION, VALPARAISO, INDIANA; AND ST.
PAUL'S CEMETERY ENDOWMENT ASSOCIATION, INC., An
Indiana Not-For-Profit Corporation,

Petitioners

v.

ANDREW G. GRUTKA, AS BISHOP OF THE ROMAN
CATHOLIC DIOCESE OF GARY, INDIANA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE INDIANA COURT OF APPEALS, THIRD DISTRICT

BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Respondent, Andrew G. Grutka, the Bishop of the Roman Catholic Diocese of Gary, Indiana, is the fee owner of the real property which constitutes the cemetery of St. Paul's Catholic Church, a parish of that diocese. The cemetery is operated by an unincorporated association, St. Paul's Cemetery Association (hereinafter "Association"). The Rules and Regulations of the Association (see Petition, A-27 - A-38) provide that it shall consist of the pastor of St. Paul's Catholic Church and a Board of Lay Trustees appointed by the pastor. It is a prime function of the Association to receive funds for the perpetual care of lots and graves and the operation of the cemetery. The Rules and Regulations contain numerous provisions stressing the nature of the cemetery as an institution of the Catholic faith and of the diocese — *e.g.*, Article 22, which states that deeds therein are "subject to the . . . discipline of the Catholic Church, and the laws of the Diocese of Gary . . ." Article 5 provides:

"In case of major controversy, the decision of the Most Reverend Bishop of the Diocese of Gary, Indiana, or his delegate, shall be final, and no appeal from any such decision shall be taken to the civil courts."

Article 12 provides that the beneficiaries of St. Paul's Cemetery are any and all Catholics in the Valparaiso area who desire and are granted a burial plot therein.

In 1966 petitioners, members of the Association's Board of Lay Trustees, without the knowledge or consent of the Bishop, formed a not-for-profit corporation under the name "St. Paul's Cemetery Endowment Association, Inc." (hereinafter "Corporation"), to which they transferred perpetual care and operating funds held by the Association. In 1974 the Corporation placed the funds in First National Bank of Valparaiso, Indiana (hereinafter "Bank"), under an irrevocable agreement of trust for the care of the cemetery. Petitioners thereafter denied the pastor access to the records of the Association and of the Corporation, as well as participation in the operation of the cemetery.

After the pastor protested the creation of the Corporation's

trust and his exclusion from the affairs of the cemetery, he submitted the controversy to the Bishop for determination. The Bishop ordered the books and records of the cemetery to be turned over to the pastor, the funds to be paid over to the Association, the pastor to participate in the operation of the cemetery, and the pastor's directions to be followed with respect to appointment of members to the Board of Lay Trustees.

Upon refusal of the petitioners to act in accordance with the Bishop's determination, the Bishop commenced an action in the Porter [Indiana] Superior Court for a mandatory injunction to compel them to do so.¹ The defendants in that action (petitioners here and the Bank) moved for summary judgment on the ground that the dispute turned on "ecclesiastical and doctrinal tenets" of the Catholic Church and that the civil courts are barred by the First and Fourteenth Amendments to the Constitution of the United States from deciding such a dispute. On June 15, 1981, the Porter Superior Court, without opinion, granted the motion. The Bishop then appealed to the Court of Appeals of Indiana.

The Court of Appeals, on February 24, 1983, reversed, holding that the case involved no determination by a civil court of ecclesiastical or doctrinal questions but could be decided upon the basis of the "neutral principles," *Jones v. Wolf*, 443 U.S. 595, 603 (1978), which the court, by reference to the Association's Rules and Regulations, then applied.² The Court of Appeals remanded the case to the trial court for determination of whether the Bishop had consented to the Corporation's trust.

1. The Bank was joined as a defendant, but is not a petitioner here.

2. The court, stating that the Bishop, as head of the Gary Diocese, is the trustee of St. Paul's Cemetery, held that, under Indiana law, a second trust (i.e., to the Bank) could be created only if (a) *all* the beneficiaries of the original trust made the second trust or (b) the trustee of the original trust (the Bishop) consented to the creation of the second trust. Noting that the Rules and Regulations provide that the cemetery beneficiaries are all those Catholics who desire a plot therein, and that thus St. Paul's members may not be the exclusive beneficiaries of the plots held in trust by the Bishop, the Corporation could not have created a second trust under (a) above. As to whether it could have under (b), the fact question of the Bishop's consent was as yet undetermined.

Before the trial court took action upon remand, petitioners sought review by the Supreme Court of Indiana which, on July 26, 1983, without opinion, denied review.

Again, without awaiting any action by the trial court on the remand, petitioners, on November 1, 1983, filed a Petition For A Writ of Certiorari with the Supreme Court of the United States.

SUMMARY OF ARGUMENT

This Court's jurisdiction extends, under 28 U.S.C. §1257, to review of "final judgments" rendered by a state court of last resort. No such judgment has here been rendered, the case having been remanded to the trial court by the Indiana Court of Appeals for a factual determination underlying a question of state law.

But if the decision below be considered "final", within the meaning of 28 U.S.C. §1257, that decision is fully consonant with controlling principles of law previously settled by applicable decisions of this Court regarding judicial resolution of property disputes involving hierarchically governed religious denominations.

REASONS WHY THE WRIT SHOULD BE DENIED

For two reasons, the writ should be denied:

1. If it be considered, *arguendo*, that this Court has jurisdiction under 28 U.S.C. §1257, the case, insofar as the constitutional claims of petitioners are concerned, was exhaustively considered and correctly decided by the Indiana Court of Appeals under long established precedent decisions. *Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Church*, 393 U.S. 440 (1969); *Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg*, 396 U.S. 367 (1970); *Jones v. Wolf*, 443 U.S. 595 (1979). At issue, in the Indiana Court of Appeals, was whether the trust established by the Corporation was valid. The Court of Appeals stated the two bases, under Indiana law, upon which the trust could be so held:

the action of all the beneficiaries of the initial trust to make a new trust, or the consent thereto of the trustee of the initial trust. The court found that it was possible to determine whether either basis existed without involving itself in any doctrinal or ecclesiastical question. Instead, it was able to apply "neutral" principles of Indiana trust law to the "neutral" facts (a) of the Rules and Regulations and (b) that "Bishop Grutka, as the current head of the Gary Diocese, is the trustee of St. Paul's Cemetery." (Petition A-10). That application was correct under this Court's decisions.

The Court of Appeals was also correct in its application of what it termed "the Polity Analysis", or examination to determine whether the church in question is hierarchical, and then, enforcement of the property decision made by "the highest authority [within that church] that has rule on the dispute at issue." *Maryland & Virginia Eldership of the Churches of God*, *supra*, 368-369 (1970).

By contrast, it is petitioners' position that the principles developed by the Supreme Court of the United States in *Blue Hull, Sharpsburg*, and *Jones v. Wolf* should be abandoned. Petitioners' lengthy argument (Petition, 4-15) would appear to call for action counter to the principle stated in *Sharpsburg*:

"Under Watson civil courts do not inquire whether the relevant church governing body has power under religious law to control the property in question. Such a determination, unlike the identification of the governing body, frequently necessitates the interpretation of ambiguous religious law and usages."

Id. at 369.

2. Supreme Court review is barred by 28 U.S.C. §1257. The decision which petitioners pray this Court to review is not a final judgment rendered by the highest court of a state in which a decision could be had. In Indiana the case is presently on remand to the trial court for determination of the critical factual issue of whether Bishop Grutka gave consent to the creation of the second trust. If the trial court determines that he did, petitioners will at that point have won, and their petition here be-

comes a dead letter or, at most, an application for an advisory opinion on church property law. Only if, and when, the trial court determines that the Bishop did not give consent, will petitioners be able to assert (on the basis of the constitutional theory which they have advanced), any claim of injury under the Constitution in order to meet the requirements of §1257. Petitioners are at present in pursuit of relief in this Court, while they continue in pursuit of relief in the Porter Superior Court. In no sense has the stage of finality of state court proceedings been reached, and granting of the petition by the Supreme Court would be at most point to piecemeal resolution of the controversy.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the petition for a writ of certiorari be denied.

Respectfully submitted,

William Bentley Ball
Philip J. Murren
Sandra E. Wise

BALL & SKELLY
511 North Second Street
P.O. Box 1108
Harrisburg, PA 17108
(717) 232-8731

William J. O'Connor
5272 Hohman Avenue
Hammond, IN 46320
(219) 937-0500

*Attorneys for Respondent Andrew
G. Grutka As Bishop of the Roman
Catholic Diocese of Gary, Indiana*